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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 418

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

The purpose of this Reply Brief is to call this Court's attention to recent representations made by Penn Water and the Pennsylvania Public Utility Commission to the United States Court of Appeals for the District of Columbia, which point up the imperative need for review by this Court of the case at bar, to resolve an important jurisdictional conflict.

On November 22, 1950—two days before our petition for certiorari was filed—Penn Water filed a motion in the proceedings now pending before the United States Court of Appeals for the District of Columbia to review the Federal Power Commission's rate order dated January 5, 1949, and passed *In the Matter of Pennsylvania Water and Power*

Company, FPC Docket No. IT-5915, which motion contains important representations by Penn Water. This motion seeks a postponement of the rate order review proceedings for a reasonable time "after action by the Supreme Court of the United States on the decision of the United States Court of Appeals for the Fourth Circuit" in the case at bar.

In this motion, Penn Water makes repeated representations,* quoted below, to the Court of Appeals for the District of Columbia, which establish Penn Water's position that, by obtaining a favorable decision from the Court of Appeals for the Fourth Circuit striking down the Basic Agreement, it has cut the ground from under the Federal Power Commission's jurisdiction over Penn Water's rates and charges, which jurisdiction was effectively asserted by the Commission in a proceeding which took years to try, and covered 21,000 pages of testimony and hundreds of exhibits. These characterizations by Penn Water of the effect of the decision of the Court of Appeals for the Fourth Circuti emphasize the clear cut conflict between the Federal Power Commission's own decision in the rate case, as asserted by Penn Water and the Pennsylvania Public Utility Commission, and the decision of the Court of Appeals for the Fourth Circuit in the present case, as to the jurisdiction of the Federal Power Commission. They emphasize the imperative need for a decision by this Court resolving that conflict. The question of the primary jurisdiction of the Federal Power Commission over Penn Water's tariff, which is the Basic Agreement, should be determined by this Court.

---

* In its Brief in Opposition, pp. 6 and 7, Penn Water argues that the District Court's finding in the case at bar, that the motive and purpose of Penn Water's collateral attack upon the Basic Agreement was to escape the jurisdiction of the Federal Power Commission over its rates and charges, was unsupported, and Penn Water, in this brief, attempts to disavow that motive and purpose. The representations which Penn Water makes in the motion are completely inconsistent with this attempt.

On November 30 1950, respondent Pennsylvania Public Utility Commission, in a similar Motion to Postpone the rate review proceedings in the Court of Appeals for the District of Columbia, makes similar representations, quoted below.

If the abrogation of the Basic Agreement by the Court of Appeals for the Fourth Circuit has the jurisdictional effect now ascribed to it by Penn Water and the Pennsylvania Commission, then a situation is presented in which a Federal administrative tribunal, with all parties to the case at bar before it, and with quasi-judicial powers to determine its own jurisdiction in the first instance, subject to direct statutory court review,* has determined that it has jurisdiction, and a Court of Appeals, *not in direct review proceedings but in collateral proceedings,* has determined that it has not. Which shall govern?

Penn Water's Representations

The representations of Penn Water contained in its said motion to which we allude, are as follows:

> "In arriving at the conclusions set forth as the basis of the orders herein sought to be reviewed, the Commission examined Petitioners' operations upon the premise that a certain long term contract between Penn Water and Baltimore Company (the Baltimore contract) was valid and would continue to be in full force and effect through April 22, 1980. The rights, obligations and responsibilities created by the Baltimore contract, and the continuance of Penn Water's operations in accordance therewith, *is inherent in and essential to the Commission's conclusions that (a) it had jurisdiction to regulate all of Penn Water's rates and charges,* * * * " (p. 3)
>
> "Petitioners submit that if the Supreme Court of the United States should deny the application for the

* See: *F. P. C. v. Arkansas Power & Light Co.,* 330 U. S. 802 (1947); *S. E. C. v. Otis & Co.,* 338 U. S. 843 (1949); *Endicott-Johnson Corp. v. Perkins,* 317 U. S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1945).

aforesaid writ of certiorari, or if such writ should be granted and the aforesaid decision of the United States Court of Appeals for the Fourth Circuit be affirmed, *the considerations upon which the Commission's orders herein sought to be reviewed were based, would be legally and factually untenable and the issues in these proceedings would, in consequence, become moot.*" (p. 4)

* * * * * *

"The order of January 5, 1949 and all subsequent orders of the Commission issued in these rate proceedings were entered in accordance with opinions and findings of the Commission which included, among other things, the following conclusions:

> '(i) That the Commission has jurisdiction to regulate all Penn Water's rates and charges, both as a "licensee" under Part I of the Federal Power Act and as a "public utility" under Part II of the Federal Power Act, *because Penn Water's operations and revenues were governed by the Baltimore contract* (Pet. App. 180, 182-184); * * * '". (p. 7)

"If the decision of the United States Court of Appeals for the Fourth Circuit, declaring the Baltimore contract illegal and invalid, become final, *the Commission's determinations as to its own jurisdiction to entertain these proceedings,* * * * *will become wholly nugatory* * * *." (p. 8)

* * * * * *

"Unless the consideration of the instant proceedings by this Court is postponed, the merits of that position will have to be presented to this Court on the basis of the decision of the United States Court of Appeals for the Fourth Circuit while review of that decision is being sought and without benefit of the Supreme Court's action or views thereon.

"If the decision of the United States Court of Appeals for the Fourth Circuit, invalidating the Baltimore contract, becomes final, Petitioners are prepared to urge to this Court that *the proceedings before the Commission, and the orders herein sought to be re-*

viewed, are invalid because they are premised upon the validity and binding force of the obligations set forth in the Batlimore contract and upon the continuance of operations pursuant thereto, * * * " (p. 12)

* * * * * *

"It is evident from the Commission's findings that its asserted jurisdiction to regulate all the rates and charges of Penn Water, both under Part I and Part II of the Federal Power Act, is premised upon operations which the Commission conceives to be required by the Baltimore contract. If the Baltimore contract is invalid the contractual method upon which the Commission *premised its jurisdictional findings is nonexistent."* (p. 14)

* * * * * *

"The *Commission's findings of jurisdiction would be unsupported* if the decision of the United States Court of Appeals for the Fourth Circuit declaring invalid and illegal those contractual arrangements upon which the findings are premised should become final because the Commission's determination would have been based upon a set of conditions invalid and illegal at the time the determination was made and which would continue to be illegal in the future." (p. 16)

* * * * * *

"Whether or not the Commission would have jurisdiction to examine the reasonableness of the rates and charges to be contained in any such rate schedule (a new rate schedule which Penn Water suggests that it might file), *or the extent thereof, if any, is a question which need not now be determined.* The significant factor is that *the tariff that has been prescribed by the Commission,* allegedly in accordance with its rate order, is premised upon the continued existence of the Baltimore contract. If the Baltimore contract is invalid the rate schedule prescribed pursuant thereto is unsupportable." (p. 21) (Italics supplied and material in parenthesis supplied).

Pennsylvania Public Utility Commission's Representations

"4. The contract which the United States Court of Appeals for the Fourt Circuit has declared invalid, prescribes the operations under which the Federal Power Commission took jurisdiction over all the rates and charges of Pennsylvania Water and Power Company, with the exception of direct sales to the Pennsylvania Railroad. If this holding is not disturbed by the Supreme Court of the United States *the basis of Federal Power Commission jurisdiction may well be lost;*

"5. If the contract is finally determined to be invalid and the method of operations by Pennsylvania Water and Power Company is thereby changed, it would become necessary for the Federal Power Com mission to make new jurisdictional findings or to renounce its jurisdiction over all or part of the rates and charges of Pennsylvania Water and Power Company." (Italics supplied)

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1950

No. 424

JOHN H. HESSEY, FRANK HARPER, and OLIN R. HIGGINS, Constituting The PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners

vs.

PENNSYLVANIA WATER AND POWER COMPANY, and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It will be found in Vol. III, pp. 75-102 of the Record.* The opinion of the District Court (Vol. I, p. 1) is reported in 89 F. Supp. 452.

* All such references herein are to volumes of the Appendices forming part of the record filed with this court in the matter of Consolidated Gas Electric Light and Power Company of Baltimore v. Pennsylvania Water and Power Company and Pennsylvania Public Utility Commission, No. 418 October Term, 1950.

JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under U.S.C. Title 28, Sec. 1254.

COUNTER-STATEMENT OF THE CASE

A complete counter-statement of the case appears in our brief in opposition to certiorari in Consolidated Gas Electric Light and Power Company of Baltimore, Petitioners, vs. Pennsylvania Water and Power Company and Pennsylvania Public Utility Commission, Respondents, at No. 418 October Term, 1950.

Supplementing the above mentioned counter-statement, we desire to submit the following additional information.

We first desire to point out that the Public Service Commission of Maryland (Petitioners) in setting forth numerically the grounds upon which the Court of Appeals reversed the District Court, failed to include the very important conclusion of the Court of Appeals that "* * * We hold merely * * * that the contract is invalid since it * * * disables Penn Water from performing its proper function as a public utility under the public utility laws of Pennsylvania; * * *" (Vol. III, p. 101). This holding is completely supported by the Court's reasoning in its opinion (Vol. III, pp. 97-98).

Petitioners assert that the agreement in question provides "* * * for the sale of **all** of Penn

Water's energy to Consolidated at wholesale in interstate commerce, * * *" (Petitioner's Brief, p. 3). This statement, which is apparently the keystone of Petitioner's entire argument, is directly contrary to the summary of the contents of the agreement by the District Court (Vol. I, p. 5) which reads as follows:

> "Article II provides for the purchase by Electric of all of Power's electrical capacity and energy **not otherwise disposed of by Power** in the performance of (1) Power's then existing contracts (namely, those with its Pennsylvania customers); (2) new contracts entered into by Power with Electric's approval; and (3) 'any duty or obligation to serve imposed on Power by its charter or otherwise by law.'" (emphasis added)

It is also directly contrary to the finding of the Court of Appeals (Vol. III, pp. 77-78) which reads as follows:

> "Penn Water **sells its electric energy** and services in bulk **to five customers.** It has a contract with Metropolitan Edison Company, which operates in the central and eastern part of Pennsylvania; a contract under which it supplies electric services to the Philadelphia Electric Company at Coatesville, which serves an area around Chester, Pennsylvania; a contract with Pennsylvania Power and Light Company

for the supply of power in the Lancaster territory extending from the Maryland line north to Harrisburg and eastward to Reading. These three public utility companies are the Pennsylvania customers of Penn Water. In addition Penn Water has a contract with Consolidated to supply power and energy over transmission lines to Baltimore, and also in connection with another contract to the Pennsylvania Railroad. Most of the energy supplied to the Railroad is delivered from Safe Harbor to Perryville, but there is another source of supply to the Railroad in Washington. It will be seen that the greater part of the energy produced by Penn Water is sold at wholesale to four customers, while the remaining portion is sold at retail to the Pennsylvania Railroad as consumer." (emphasis added)

This contention that the agreement provides for the sale of all of Penn Water's energy at wholesale and interstate commerce contradicts the admission of Consolidated itself when it admitted Penn Water's allegation that Penn Water "* * * sells all of its electric services in bulk to five customers * * *" (Vol. II, p. 1-2 par. 5 of Complaint; Vol. II, p. 26, Par. 1 of Answer).

Maryland Commission alleges that the basic agreement "* * * has been considered separately

by all three commissions on several occasions and also by the courts." (Petition p. 8). The truth of the matter, of course, is that no Commission and no Court has ever considered the agreement in the light of the Sherman or Clayton acts, or in the light of the surrender of powers and duties by one public utility to another except in the present litigation.

REASON FOR DENIAL OF MARYLAND COMMISSION'S PETITION FOR WRIT OF CERTIORARI

In response to a petition at No. 418 October Term, 1950 by Consolidated Gas Electric Light and Power Company for writ of certiorari to the United States Court of Appeals for the Fourth Circuit concerning an opinion of that court dated September 30, 1950, the Pennsylvania Public Utility Commission is submitting a brief in opposition thereto.

The Public Service Commission of Maryland (Maryland Commission) has now filed its petition for a writ of certiorari in regard to the same opinion of the Court of Appeals. Since the petition of the Maryland Commission is substantially a reiteration of the position taken by Consolidated in its petition, the Pennsylvania Commisson respectfully requests this Court to consider the arguments in its brief in opposition to Consolidated to be applicable to the instant petition of the Maryland Commission.

The position of the Maryland Commission, insofar as the application of Pennsylvania law and public policy are concerned, is that as a result of the agreement of 1931, herein questioned,

Pennsylvania Water & Power Company sells **all** its power to Consolidated, which, being an interstate sale, precludes the Pennsylvania Commission from any jurisdiction over Penn Water.

The Maryland Commission's novel "one-sale" concept is incorrect. Penn Water is not selling all its energy to Consolidated. It is merely selling to Consolidated whatever is left after its existing contractual customers are supplied, namely, Pennsylvania Power & Light Company, Metropolitan Edison Company, Philadelphia Electric Company, and the Pennsylvania Railroad Company. In other words it is a **residual** type contract; Consolidated is entitled to whatever Penn Water does not need to serve its Pennsylvania wholesale customers and its retail customer, the Pennsylvania Railroad Company.

In our counter-statement above, we point out that the two opinions below as well as the pleadings absolutely refute any concept of the sale of all of Penn Water's output to Consolidated.

As shown in the record (Vol. I, pp. 116-117), the present Pennsylvania customers (or their corporate predecessors) have been served by Penn Water continuously from dates long prior to the 1931 agreement. The agreement of 1931 expressly subordinates Consolidated's entitlement to the contractual needs of **existing** customers and to the contractual needs of future customers.

If the converse were true, i. e. if Consolidated is buying all of Penn Water's energy then Consolidated is in effect doing business in Pennsylvania without having qualified to do so.

The clear meaning of the agreement is that Consolidated buys whatever energy Penn Water has not contracted to sell elsewhere. (Vol. I, p. 60). Maryland Commission's tortuous reasoning is obviously without merit. To reiterate the contention made in our brief in opposition to Consolidated, the Pennsylvania Commission's minimum and undisputed jurisdiction over the direct sale at retail to the Pennsylvania Railroad Company (**Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, et al.,** 332 U. S. 507 (1947)) is sufficient to give Pennsylvania a direct interest in the questioned agreement and in keeping Penn Water free to give that company adequate service at reasonable rates.

Conclusion

Penn Water does not sell all its energy to Consolidated but only what remains after sales to its own customers under existing contracts, and Pennsylvania Commission clearly possesses regulatory power over Penn Water. For these reasons and for those advanced in our brief in opposition to Consolidated's petition for writ of certiorari, both petitions should be denied.

Respectfully submitted,

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Counsel for Respondent, Pennsylvania Public Utility Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 424

JOHN H. HESSEY, FRANK HARPER,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John H. Hessey, Frank Harper, and Olin R. Higgins, constituting the Public Service Commission of Maryland, petitioners (Maryland Commission), pray for the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review a judgment of that Court

dated September 30, 1950, which reversed a judgment of the United States District Court for the District of Maryland dated February 28, 1950.

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Pennsylvania Water and Power Company (Penn Water) brought suit in the District Court for a declaratory judgment that a long-term electric energy sales contract dated June 1, 1931, between it and Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), was invalid. The Maryland Commission, in order to assert the interests of the electric consuming public of Maryland, was permitted to intervene in these proceedings as party defendant, and the Pennsylvania Public Utility Commission (Pennsylvania Commission) intervened as a party plaintiff. The District Court, after trial, in a carefully considered and comprehensive opinion, held the contract valid in every respect. The Court of Appeals reversed and remanded the case for the entry of a declaratory judgment that the contract was invalid on its face, upon the following grounds:

1. That the contract was *per se* in restraint of trade, in violation of the Sherman Act, 15 U. S. C., Sec. 1.

2. That the provision of the contract which permitted Consolidated to approve purchases by Penn Water, of electric energy from others, violated Sec. 3 of the Clayton Act, 15 U. S. C., Sec. 14.

3. That the contract required, but did not have, the approval of the Pennsylvania Public Utility Commission and, therefore, violated Sec. 3 of Art. III of the Public Service Company Law of Pennsylvania, July 26, 1913, Pamphlet Laws 1374; and

4. That the contract was contrary to the public policy of Pennsylvania.

Thus, the Court of Appeals decided four important questions of Federal law in a way apparently in conflict with applicable decisions of the Supreme Court of the United States, and two subordinate questions of Pennsylvania State law in a way apparently conflicting with the law of that State.

The opinion of the District Court is reported in 89 F. Supp. 452, and appears in the Record in Vol. I, page 1. The opinion of the Court of Appeals has not yet been reported, but appears in Vol. III, page 75, of the Record.

Interest and Position of the Maryland Commission

The main feature of the contract in question is that it provides, over a long period of years, for the sale of all of Penn Water's energy to Consolidated at wholesale in interstate commerce, and thus assures Consolidated and its Maryland consumers of an assured supply of hydro energy. Every other provision of the contract (including the restrictions upon Penn Water which the Court of Appeals found objectionable) are incidental to that main feature.

In return for this energy, Consolidated guarantees Penn Water the recovery of all of its operating expenses, including annual depreciation and taxes, and a return on its investment. Consolidated, as the purchaser and owner of all of this energy, is entitled to be credited with any money realized from the sale of any of its own energy, and thus has the right to approve or disapprove Penn Water's disposition of any of it to others. Consolidated, since it is obligated to purchase and pay for all of Penn Water's energy, including that which Penn Water purchases from others, is given the right to approve or disapprove such outside purchases. Consolidated, since it must pay Penn Water an annual return on any investment which Penn Water may make in additional plant, and the annual cost of operating the same,

has the right to approve or disapprove large plant additions by Penn Water. All of these last mentioned provisions are terms of the interstate sale. Taken together as a whole, they govern the compensation which Penn Water receives for the sale of its energy in interstate commerce.

Another important consideration is the fact that Penn Water is and has always been a wholesale supplier located in Pennsylvania. Consolidated is primarily a retail distributing company in Baltimore, Maryland, and has no operations in Pennsylvania. Thus, these two companies are not and could not be competitors, either actual or potential.

Since Penn Water is a "licensee" and a "public utility" within the meaning of the Federal Power Act, this interstate sale at wholesale is subject to the jurisdiction of the Federal Power Commission. And since the contract in question governs that interstate sale at wholesale, it follows that the contract itself, with all of its terms and provisions, is Penn Water's tariff; and it has been filed as such for years with the Federal Power Commission.

It was for that reason that the Maryland Commission, believing that the cost to Consolidated of Penn Water's energy, as determined by this contract, was excessive and therefore prejudicial to Consolidated and the Maryland consuming public, invoked the jurisdiction of the Federal Power Commission in 1944 over this filed tariff and the rates which it specified. The Federal Power Commission, at the instance of the Maryland Commission, assumed jurisdiction and after a long hearing in which this contract was fully considered and highly praised as being in the public interest, except for the amount of Penn Water's compensation thereunder, reduced all of Penn Water's rates. See *In the Matter of Pennsylvania Water and Power Company,* FPC Docket IT-5915, decided January 4, 1949, rehearing

denied February 28, 1949. By this order, the rates payable by Consolidated to Penn Water were reduced in an annual amount of $1,733,318 and the order was therefore of incalcuable benefit to the Maryland consumers who are retail consumers of Consolidated. Except for reducing the rates, the Federal Power Commission determined that "the present arrangement (the contract in question) * * * is the most practicable under the circumstances. That arrangement will therefore be continued with, however, such modifications as are necessary to accomplish the reductions mentioned above * * *."

In denying Penn Water's petition for rehearing in the proceeding involving its rates, *In re Pennsylvania Water and Power Co.,* FPC Docket IT-5915, in Opinion 173A, February 28, 1949 (p. 6), the Federal Power Commission, referring to Penn Water's allegations of illegality of the Basic Agreement and Penn Water's intent to change operations thereunder, said *"all of the carefully built benefits* of pool design, investment, construction, and operation apparently *are intended to be sacrificed* by Penn Water" (italics supplied). This the Commission refused to permit; but, if the ruling of the Court of Appeals is permitted to stand, Penn Water will immediately seek to carry out what the Federal Power Commission has already found to be contrary to the public interest.

The above described Orders and Opinions of the Federal Power Commission are now pending review in the United States Court of Appeals for the District of Columbia. On November 22, 1950, Penn Water filed in that proceeding a motion to postpone the date of oral argument and to postpone the time for filing of a reply brief "for such time after final action by the Supreme Court of the United States on the decision of the United States Court of Appeals for the Fourth Circuit" (in the instant proceeding), as might seem

reasonable to the Court therein. In its motion aforesaid, Penn Water argues that if this application for certiorari herein be denied, or if the decision of the Court of Appeals for the Fourth Circuit be affirmed, the considerations upon which the Federal Power Commission's Orders were based "would be legally and factually untenable" and the issues raised in those appeals from the Federal Power Commission Orders would, in consequence, become "moot"; and further, that the Federal Power Commission's determinations as to its jurisdiction and the control asserted over Penn Water's rates and charges would be "invalid and illegal at the time the Commission's determinations were made". Those statements are further and emphatic reasons why this Court should grant certiorari in this proceeding, reverse the Court of Appeals, and rule that any and all questions as to the nature of Penn Water's operations, contractual and otherwise, be reviewed only in the orderly manner provided by the Federal Power Act and as required by long standing doctrines of administrative law.

In a "Statement of Position", filed in the District Court in response to that Court's request, (printed in its entirety, R. Vol. II, pages 52-69), the Maryland Commission shows that Penn Water's repudiation of the Basic Agreement in the instant suit was "but a single step in a series of actions engaged in * * * by Penn Water to defeat the jurisdiction of the Federal Power Commission and to avoid a rate reduction to Consolidated that has been long overdue". That Statement sets forth the Maryland Commission's efforts, throughout that series of actions, to protect the Maryland public against the very injurious effects of such actions by Penn Water.

The Statement describes the substantial public benefits which have resulted from the Basic Agreement; the representations regarding these benefits which have been made

to the Maryland Commission by Penn Water; our Commission's request in 1938 that Consolidated's annual payments under the Basic Agreement be reduced $600,000, which was voluntarily agreed to by Penn Water and Consolidated under the Basic Agreement (see Supplemental Agreement of Sept. 29, 1939, Pl. Exh. 7, p. 41) and resulted in a $1,000,000 rate reduction to the Maryland public; our Commission's subsequent request in 1944 that the Federal Power Commission investigate the rates under the Basic Agreement; Penn Water's position in that case and its effort to deny to Maryland consumers Consolidated's contractual two-thirds share of the output of Safe Harbor (under a companion agreement entered into in 1931 by Penn Water, Consolidated, and Safe Harbor for the development of the Safe Harbor Hydro-Electric project); the Federal Power Commission's Order of November 4, 1946, reducing Safe Harbor's rates by approximately $600,000 annually (later affirmed on appeal in *Safe Harbor Water Power Corp. v. F. P. C.*, 179 F. 2d 179 (C. C. A. 3, 1949) cert. denied by this Court May 15, 1950, 339 U. S. 957); the rate case instituted against Penn Water (and later against Safe Harbor) by the Public Utility Commission of Pennsylvania; that Commission's Order of September 27, 1948, acquiesced in by Penn Water, reducing the alleged "joint rates" of those two companies to public utility company customers in Pennsylvania by $1,170,000, all of which reduction would have been *a direct charge against Consolidated and its Maryland customers* under the terms of the Basic Agreement; the injunction issued against such rate order on February 4, 1949, by a three-judge Federal District Court for the Middle District of Pennsylvania, from which injunction neither the Pennsylvania Commission nor Penn Water sought an appeal; the Federal Power Commission's Order of January 5, 1949, reducing Penn Water's rates by $2,000,000 and allocating approximately $1,700,000 thereof to Maryland; the participation of the Maryland Commis-

sion in preventing Penn Water's dislocation of the interstate electrical interconnections established by the Basic Agreement; and, finally, the substantial harm that would ensue to the public of Maryland from the abrogation of the Basic Agreement.

Penn Water's present action to terminate the Basic Agreement must be viewed against this background.

During the nearly two score years of system-wide operations under the Basic Agreement, the Maryland Commission has regarded this Agreement as creating economies and reliability of service not otherwise obtainable, and as being wholly in the public interest. Penn Water has consistently, until the present action, so represented it to the Maryland Commission, to its own stockholders, and to the Federal Power Commission. (See quotations in Consolidated's Motion for Temporary Restraining Order, Pars. "1" and "2", R. Vol. II, pages 128-132; as admitted in Penn Water's Answer, Par. II, 3, 4, and 5, Transcript of Record, Vol. I, page 322, et seq.)

The Basic Agreement has been on file, since soon after its execution, with the Maryland Commission, the Pennsylvania Commission, and as above stated, with the Federal Power Commission. It has been considered separately by all three Commissions on several occasions and also by the Courts.

Its legality or its benefits to the public as a contract have never been questioned until the present case. Penn Water now has repudiated not only the Basic Agreement but its entire course of conduct thereunder since 1931, including the formal representations regarding that contract which it has made to the Maryland Commission, to inform the latter and to influence its action. In 1938, in the hearings before representatives of the Maryland Commission leading

to the voluntary reduction above referred to, Penn Water joined with Safe Harbor in a written statement to the Maryland Commission regarding the Basic Agreement, saying:

> "The form of contractual arrangements between the companies is the outcome of two decades of developing experience, and the managements stand ready to contend that it is the most suitable one in the circumstances and that it does not contain any features inimical to the public interest." (R. Vol. II, pages 57, 130; admitted by Penn Water in its Answer to Motion, Par. II, 4, Transcript Vol. I, page 322, et seq.)

The Maryland Commission accepted that statement in 1938 and agrees with it now. The invalidation of that contract by the Court below presents a question of broad interstate and national significance which should be reviewed by this Court, more particularly for the reasons which follow in detail, in part iv of this petition.

II. JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari rests upon the provisions of U. S. C. Title 28, Sec. 1254.

III. QUESTIONS PRESENTED

1. Is the long-term contract dated June 1, 1931, which prescribes the terms and conditions under which Consolidated purchases electric power and energy from Penn Water at wholesale in interstate commerce, *per se* in violation of the Sherman Act; or is it subject to the rule of reason, and therefore valid, because the restrictions which it imposes are reasonable and in furtherance of the public interest?

2. Is the provision of this long-term contract which permits Consolidated to approve Penn Water's purchases of power and energy from others and which under the terms of the contract Consolidated is obligated to pay for, in violation of Sec. 3 of the Clayton Act?

3. Is the question of the validity of this long-term contract, which constitutes Penn Water's tariff on file with the Federal Power Commission, a matter within the exclusive primary jurisdiction of the Federal Power Commission?

4. In view of the Commerce Clause of the Constitution of the United States, does this long-term contract for the interstate sale of power and energy at wholesale require the approval of the Pennsylvania Public Utility Commission?

5. In view of the Commerce Clause of the Constitution of the United States, is this long-term contract for the interstate sale of power and energy at wholesale required to be within the public policy of the State of Pennsylvania?

6. If the approval of the Pennsylvania Public Utility Commission is constitutionally required to make this interstate contract valid, does it in fact have that approval by reason of acquiescence therein by the Pennsylvania Public Utility Commission over a long period of years?

7. Does this long-term contract as a matter of State law offend the public policy of the State of Pennsylvania?

IV. REASONS FOR GRANTING THE WRIT

The principal reason which should induce this Court to review the decision of the Court of Appeals, the Maryland Commission submits, is that the Court of Appeals has stricken down, on highly questionable legal grounds, an important contract which has been given the long-standing

approval of the regulatory bodies that considered it as being in the public interest. It has stricken this contract *on its face*, admittedly without giving any weight whatsoever to the great benefits and advantages to the public, which were the purpose and demonstrated effect of the contract. In doing so, it has aided Penn Water in its avowed objective to escape the jurisdiction and regulation of the Federal Power Commission. In doing so, it has placed in jeopardy the necessary and otherwise assured supply of hydro energy to the Maryland public. In doing so, it has placed in jeopardy a rate reduction which was long overdue, and to which the Maryland consuming public is entitled.

It is submitted that the Court of Appeals misconstrued and misapplied this Court's decisions as to what constitutes a restraint of trade illegal *per se*. Of course, any concerted tampering with the *market price structure* cannot be justified. *Socony-Vacuum Oil Co., Inc. v. United States*, 310 U. S. 150; *United States v. Trenton Potteries Co.*, 273 U. S. 392. But obviously, concerted action whereby the producer of the energy and the purchaser thereof agree upon a price for the energy sold, is not *market price fixing*. If it were, every contract for purchase and sale would be *ipso facto* illegal. And yet that, in substance, is the intention and effect of the contract in question. Under it, Consolidated, as the real owner of all of the energy produced or purchased by Penn Water, has the discretion or decision as to the prices at which it will permit its own energy to be sold. And even here, Consolidated has not the last decision, because all such prices are subject to public regulation. The decisions of this Court requiring application of the rule of reason to such a transaction have been ignored by the Court of Appeals.

The Court of Appeals held that Consolidated's right of approval over Penn Water's outside purchases of power was violative of Section 3 of the Clayton Act. Power pur-

chases by Penn Water serve no purpose other than to contribute to the over-all supply of the contractual power-pool; all at Consolidated's expense. If the Basic Agreement is to be judged on its face (as the Court of Appeals did), it must be so judged in its entirety. The contractual requirements of economic utilization of power resources (Article VIII of the Agreement, R. Vol. 1, page 66) re-enforces and emphasizes the true character of the provision under discussion; i.e., one of economy and efficiency. Furthermore, the provision in question is not a tying-clause to enable Consolidated to reserve a market for itself within the meaning of Section 3 of the Clayton Act. Clearly, the restriction has been inserted to protect Consolidated from being forced to purchase and pay for electric power which it may not need, or the purchase of which may be uneconomical.

Again, the decision of the Court of Appeals that the District Court had jurisdiction to strike down this contract gives no effect to the statutory jurisdiction of the Federal Power Commission over a tariff filed with it, which prescribes the give and take terms of an interstate sale of energy at wholesale. Section 206 of the Federal Power Act (16 U. S. C., Sec. 824e), which in terms subjects the reasonableness of a public utility's "contract affecting such rate, charge or classification" to the jurisdiction of the Commission, and authorizes it to "determine the just and reasonable * * * contract to be thereafter observed and in force" and "to fix the same by order", is not even alluded to by the Court of Appeals. The Commission's statutory power to determine whether Penn Water should have a "license", and the Commission's determination that such a license should issue notwithstanding the Basic Agreement and the provisions of Sec. 10(h) of the Act (16 U. S. C., Title 16, Sec. 803(h)), is given no effect whatever. The Commission's later determination, in a lengthy proceeding involving

Penn Water's rates *under this very Basic Agreement* (see *In the Matter of Pennsylvania Water and Power Company*, FPC Docket IT-5915, decided January 5, 1949, rehearing denied February 28, 1949), that the Agreement should be continued in effect as reasonable and in the public interest, except as modified by the rate order, is passed over as irrelevant.

Instead, the Court of Appeals turns down the primary jurisdiction of the Federal Power Commission over the Basic Agreement by relying upon *U. S. Alkali Export Ass'n., Inc. v. United States*, 325 U. S. 196, and *United States v. Borden Co.*, 308 U. S. 188. We submit that these cases are not controlling. In the *Alkali Export Ass'n.* case, the jurisdiction of the Federal Trade Commission under the Webb-Pomerene Act, completely unlike that of the Federal Power Commission under the Federal Power Act, was limited to the investigation of violations and a recommendation of their prosecution. In the *Borden Co.* case, the Secretary of Agriculture, while he had administrative jurisdiction over some of the parties to the over-all conspiracy charged, was completely lacking in jurisdiction over the principal parties to the alleged conspiracy. In the case at bar, the authority of the Federal Power Commission extends to the entire transaction in question, the interstate sale of energy at wholesale between two parties, both of which are "public utilities".

Furthermore, the Court of Appeals, in relying on the *Georgia v. Pennsylvania R. Co.* case, 324 U. S. 439 (1945) for the proposition that "regulated industries are not *per se* exempt from the Sherman Act", overlooks completely (1) the fact that four justices dissented in that case; and (2) that the majority opinion carefully emphasized that it was dealing only with a suit to enjoin a conspiracy, *not with an attempt to set aside a filed tariff*, which even the majority